Case No.

IN THE

SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

JOHN MICHAEL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

WILLIAM C. McLAIN
Assistant Public Defender
Chief, Capital Appeals

Hall of Justice Building
455 North Broadway Avenue
Bartow, Florida 33830
(813) 533-0931 or 533-1184

ATTORNEYS FOR PETITIONER

Case No.

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN MICHAEL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF FLORIDA

QUESTION PRESENTED

Whether for purposes of the rule announced in Massiah v. United States a jail inmate who has previously acted as an informant for the State continues to be an agent of the State when he, on his own initiative but for the State's use, elicits incriminating information from another inmate housed near him who has been indicted for a capital offense?

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OPINIONS BELOW

The opinion and judgment of the Supreme Court of Florida sought to be reviewed via this petition is not yet officially reported, but it is reproduced in the appendix. (A1-8)

JURISDICTION OF THE SUPREME COURT

The Supreme Court of Florida issued the opinion and judgment in this case on July 14, 1983. (A1-8) Petitioner filed a motion for rehearing which was denied on September 29, 1983. (A9) Petitioner asserted below and asserts here a deprivation of his rights as guaranteed under the United States Constitution. Title 28 United States Code, Section 1257(3), and Rule 17 of the United States Supreme Court Rules confers certiorari jurisdiction in this Court to review the judgment in this case.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. Amendment VI to the Constitution of the United States:

> In all criminal prosecutions, the accused shall enjoy the right...to have the Assistance of Counsel for his defence.

2. Amendment XIV, Section 1, to the Constitution of the United States:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On September 4, 1980, a grand jury in Pinellas County, Florida, indicted Petitioner for the first degree murder of

Fern Umble. (R23-24)(A10-11) Petitioner filed a pretrial motion to suppress the testimony of two jailhouse informants. (R1217-1218)(A12-13) The motion was denied after hearing. (R1227, 1362-1381)(A14-33,34) On April 29, 1981, a jury found Petitioner guilty as charged, judgment was entered against him and the death penalty was imposed. (R1259,1261-1264)(A35,36-38) The Supreme Court of Florida affirmed Petitioner's conviction and sentence in the judgment now before this Court.

On July 3, 1980, the body of elderly Fern Umble was found near Tarpon Springs, Florida. (A1) She had been beaten, strangled, and stabbed. Miss Umble had moved to Largo, Florida, in June of 1980 with 37-year-old Petitioner. (A1) The two had known each other for some time while in Ohio and had a very close relationship. (A1) Miss Umble, a very religious woman, looked to Petitioner for advice and support in business and religious matters; both referred to him as a prophet of God. (A1) In February of 1980 she changed her will to leave her sizeable estate to Petitioner to "continue the work of the Lord." (A1)

In the early part of July an acquaintance of Petitioner's, a sixteen-year-old boy on summer vacation, moved in with the couple for a few days. (A1) Petitioner and the boy had a homosexual affair. (A1) Miss Umble and Petitioner had a small argument on the morning of July second. (A2) Petitioner took the boy to St. Petersburg, saying that he wanted to talk with Miss Umble alone. (A2) Several hours later Petitioner returned for the boy and told him that he had kicked her out of the house and had taken her to a park where she could catch a limousine to the airport. (A2) He further told the boy that Miss Umble had spilled ketchup on the living room rug creating a large stain. (A2) The two went to a sporting goods store where Petitioner bought the boy a thousand dollars' worth of scuba equipment. (A2)

On July 11, Petitioner reported Miss Umble missing. (A2) He told the police that on the morning of July second Miss Umble said that she wanted to make a surprise visit to her friends in Ohio. (A2) She asked to be taken to a local K-Mart so that she could buy some clothes and catch a taxi to

the airport. (A2) That was the last time he saw her. (A2) He called her friends in Ohio several times in the next few days, and, when no one had seen her, he reported her missing. (A2)

On July 15, Petitioner identified a picture of the body and the clothes, quilt, bathrobe and towel in which it was wrapped. (A2) The body was clothed in a different dress from the one Miss Umble had worn on leaving, and Petitioner said that she must have returned to their mobile home from the K-Mart store because she had not taken the other items with her when she left. (A2) The police became suspicious of Petitioner and searched the mobile home. (A2) The large ketchup stain was found to be blood that matched Miss Umble's type. (A2) Fibers and hairs from the trunk of their Cadillac matched those found on the victim's body. (A2) Tire tracks found near the body came from their car. (A2) A luminal test for bloodstains disclosed a large stain that could have resulted from the victim being dragged from her bedroom and hidden in the closet. (A2) The police found Miss Umble's will in a lock box in Petitioner's room and confiscated it. (A2) On July 22, Petitioner boarded a plane for Cleveland and disappeared until arrested in Arizona on August 2. (A2)

Petitioner was in the Pinellas County jail when indicted on September 4, 1980. (A2-3) On September 5, he gave a detailed confession to Jeffery Allen, another inmate housed in a cell across from Petitioner's. (R1802)(A3) On September 10, Allen contacted Detective Bolle and reported Petitioner's confession. (R1804-1808)(A3) That was the first time any law enforcement agent had talked with Allen about Petitioner's case. (A4) Bolle told Allen to listen to any statements Petitioner might make, but, in the future, not to question Petitioner. (R1366) Bolle also told Allen that, when Petitioner's case was over, he would make Allen's cooperation known to whomever Allen wished. (R1365-1366) Allen reported back to Bolle on September 11 and 12 with further incriminating information obtained from

Petitioner. (R1366-1367) Bolle later advised the State Attorney's Office of Allen's cooperation. (R1375,1848) A similar set of events occurred with another inmate, Thomas Carmichael. (A3)

On appeal to the Supreme Court of Florida Petitioner contended that, because Allen and Carmichael had been used previously as informants during prison riots, they continued to be agents of Detective Bolle. (A4) In rejecting Petitioner's contention the Court wrote:

> Detective Bolle, however, had been assigned to the Pinellas County jail exclusively to investigate crimes occurring wholly within the jail and to obtain intelligence on any possible riots or disturbances that might happen in the jail. Pursuant to his job of uncovering possible riot or disturbance conditions it was necessary to call upon prisoner witnesses to give testimony. He used Allen and Carmichael as informants in those cases, but had not requested them to supply information about the instant case. We do not agree with Michael's contention that once an inmate is used as an informant, he becomes an agent for the state in all subsequent situations where he is an informant.

(A4)

REASONS FOR GRANTING THE WRIT

I.

This Court has repeatedly held that once adversary proceedings have been commenced against an individual - whether by way of formal charge, preliminary hearing, indictment, information or arraignment - he has a right to legal representation if the government questions him. United States v. Henry, 447 U.S. 264, 65 L.Ed.2d 115, 100 S.Ct. 2183 (1980); Brewer v. Williams, 430 U.S. 387, 51 L.Ed.2d 424, 97 S.Ct. 1232 (1977); Massiah v. United States, 377 U.S. 201, 12 L.Ed.2d 246, 84 S.Ct. 1199 (1964). This Court has never defined, however, who qualifies as an agent of the government for purposes of the well-settled rule. See Thomas v. Cox, 708 F.2d 132,135 n.2 (4th Cir. 1983). Instead, the three principal decisions that define the sixth amendment's protection where a government

agent elicits incriminating information from an accused in the absence of counsel, assume the "agency" of the person eliciting the information and focus on whether the agent has "deliberately elicited" the information.

In Massiah, this Court held that the defendant's right to counsel was violated "when there was used against him at his trial evidence of his own incriminating words, which federal agents had deliberately elicited from him after he had been indicted and in the absence of his counsel." 377 U.S. at 206, 12 L.Ed.2d at 250, 84 S.Ct. 1199. There the direct elicitor was a co-defendant, turned government informer, who had allowed the government to install a radio transmitter in his car for the purpose of obtaining Massiah's statements. The "agency" of the co-defendant in those circumstances was simply assumed.

In Brewer, the Court held that a police detective's "Christian burial speech" constituted deliberate interrogation so as to violate the defendant's right to counsel. Since the direct eliciter was a police officer "agency" was not in issue.

In Henry, government agents contacted an inmate at the jail where Henry was awaiting trial for bank robbery. For some time prior to the meeting the inmate had been engaged as an FBI informant, receiving monitary payment on a contingent fee basis. The record did not disclose whether the inmate was contacted for the purpose of acquiring information about Henry. During the contact, an agent instructed the inmate to be alert to statements made by other prisoners, but not to initiate any conversation with Henry regarding the robbery. The inmate then developed a relationship of trust and confidence with Henry such that Henry revealed incriminating information to him. The informant provided the agent with the information and was paid. In holding that the government had elicited incriminating information from the defendant in violation of Massiah the Court again focused on whether the information had been "deliberately

elicited." Although the Henry court considered the question of "agency" of sufficient import to require attention, it, in essence, assumed the existence of agency from the facts of prior employment as an informer and a specific fee arrangement for information against Henry. See 447 U.S. at 270, 65 L.Ed.2d at 122, 100 S.Ct. 2183.

The lack of clear guidance in this area has led to conflict among the state courts. In State v. Smith, 482 P.2d 863 (Ariz.1971), the Supreme Court of Arizona found, on facts similar to those in Petitioner's case, an agency relationship between an inmate and the government. The Court stated:

> ***this court does not live in the never-never land of Peter Pan.
> Given the following facts: In 1966, A supplies information to B pursuant to an agreement that in exchange for such information B will perform services for A; the information is supplied and the services are rendered; in 1967, A again supplies information to B and B again performs services for A, and in order to perform these services B bypasses the mandate of a court and the duly constituted Parole Board of this state. Are we to close our eyes to the logical conclusion that the 1967 services were also performed pursuant to an agreement, either spoken or unspoken?
> ***In our opinion, the conclusion is inescapable in this case that [the informant] expected some benefit to accrue from his assisting the state and in view of the past dealings of [the informant] with the County Attorney based upon a favor done for a favor received, that the state intended to reciprocate for such assistance.

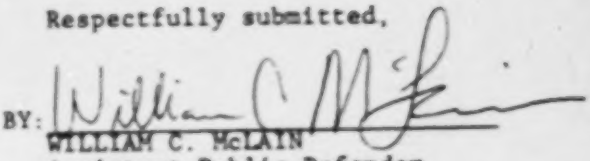
482 P.2d at 867.

Petitioner believes that the direct elicitors in his case were acting as agents for the State. He urges this Court to grant a writ of certiorari.

CONCLUSION

For the reasons stated, Petitioner asks this Court to grant a writ of certiorari.

Respectfully submitted,

BY: 

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Member Of The Bar Of The United States Supreme Court

ORIGINAL

Case No.

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IN THE

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JOHN MICHAEL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Supreme Court, U.S.
FILED
NOV 14 1983
Alexander L. Stevas, Clerk

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

83-5944

Petitioner, JOHN MICHAEL, asks leave to file the attached Petition for Writ of Certiorari to the Supreme Court of Florida without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. The Petitioner's affidavit in support of this motion is attached.

Respectfully submitted,

JERRY HILL
PUBLIC DEFENDER
TENTH JUDICIAL CIRCUIT

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COUNSEL FOR PETITIONER

Case No. 83-5945

IN THE

SUPREME COURT OF THE UNITED STATES

JOHN MICHAEL,

Petitioner,

vs.

STATE OF FLORIDA,

Respondent.

Supreme Court, U.S.
FILED
NOV 14 1983
Alexander L. Stevas, Clerk

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OFFICE OF THE CLERK
SUPREME COURT, U.S.

AFFIDAVIT IN SUPPORT OF PETITIONER'S MOTION TO PROCEED IN FORMA PAUPERIS

I, JOHN MICHAEL, being first duly sworn, depose and say that I am the Petitioner in the above-styled case; that in support of my motion to proceed on my Petition for Certiorari without being required to prepay fees, costs or give security therefor, I state that because of my poverty, I am unable to pay the costs of said proceeding or to give security therefor; and that I believe I am entitled to redress.

I further swear that the responses which I have made to the questions and instructions below relating to my ability to pay the costs of the proceedings are true:

1. Are you presently employed? Yes____ No X

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received. July, 1980; $1,200 per month

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? Yes____ No X

a. If the answer is yes, describe each source of income, and state the amount received from each during the past twelve months._____

_____

_____

3. Do you own any cash or checking or savings account? Yes____ No X

a. If the answer is yes, state the total value of the items owned._____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes____ No X

a. If the answer is yes, describe the property and state its approximate value._____

_____

_____

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

_____

_____

I understand that a false statement or answer to any question in this affidavit will subject me to penalties for perjury.

Mr. John Michael

Petitioner - John Michael

Subscribed and sworn to before me this 8 day of November, 1955.

Notary Public

My Commission Expires:

APPENDIX

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8.	Findings in Support of Sentence of Death	A36

Supreme Court of Florida

No. 60,712

JOHN MICHAEL, Appellant,

v.

STATE OF FLORIDA, Appellee.

[July 14, 1983]

PER CURIAM.

John Michael appeals his conviction of first-degree murder and sentence of death. We have jurisdiction[1] and affirm both the conviction and sentence.

On July 3, 1980 the body of 83-year-old Fern Cable was found near Tarpon Springs, Florida. She had been severely beaten, strangled, and stabbed. Miss Cable had moved to Largo, Florida, in June of 1980 with 37-year-old John Michael. The two had known each other for some time while in Ohio and had a very close relationship. Miss Cable, a very religious woman, looked to Michael for advice and support in business and religious matters; both referred to him as a prophet of God. In February of 1980 she changed her will to leave everything to Michael to "continue the work of the Lord." The original will left her sizeable estate to her brother, to Oral Roberts University, and to several nationally known evangelists.

In the early part of July an acquaintance of Michael's, a sixteen-year-old boy on summer vacation, moved in with the couple for a few days. Michael and the boy had a homosexual affair.

---

[1] Art. V, § 3(b)(1), Fla. Const.

A1

Miss Umble and Michael had a small argument in the morning of July second. Michael took the boy to St. Petersburg, saying that he wanted to talk with Miss Umble alone. Several hours later Michael returned for the boy and told him that he had kicked her out of the house and had taken her to a park where she could catch a limousine to the airport. He further told the boy that Miss Umble had spilled ketchup on the living room rug creating a large stain. The two went to a sporting goods store where Michael bought the boy a thousand dollars' worth of scuba equipment.

On July 11 Michael reported Miss Umble missing. He told the police that on the morning of July second Miss Umble said that she wanted to make a surprise visit to her friends in Ohio. She asked to be taken to a local K-Mart so that she could buy some clothes and catch a taxi to the airport. That was the last time he saw her. He called her friends in Ohio several times in the next few days, and, when no one had seen her, he reported her missing.

On July 13 Michael identified a picture of the body and the clothes, quilt, bathrobe, and towel found with it. The body was clothed in a different dress from the one Miss Umble had worn on leaving, and Michael said that she must have returned to their house trailer from the K-Mart store because she had not taken the other items with her when she left. The police became suspicious of Michael because of the inconsistencies in his story and searched the trailer. The large ketchup stain was found to be blood that matched Miss Umble's type. Fibers and hairs from the trunk of their Cadillac matched those found on the victim's body. Tire tracks found near the body came from their automobile. A luminal test for bloodstains found a large stain that could have resulted from the victim being dragged into her bedroom and hidden in the closet. The police found Miss Umble's will in a lock box in Michael's room and confiscated it. On July 12 Michael boarded a plane for Cleveland and disappeared until arrested in Arizona on the second of August.

Michael was in the Pinellas County jail when indicted on

A2

September 4, 1980. He confessed to a fellow inmate, Jeffery Allen, on September 5th and on September 10th Allen contacted Detective Bolls and reported Michael's confession. A similar set of events occurred with another inmate, Thomas Carmichael. Allen and Carmichael volunteered the incriminating statements to Detective Bolls without any prior inducement. While in jail Michael wrote Allen several love letters, one of which was introduced at trial. Michael had been found competent to stand trial, but there was testimony that he suffered from mental or emotional problems.

Michael urges seven points on appeal. After reviewing the instant record, we find Michael's conviction supported by competent substantial evidence and the issues raised show no reversible error.

Michael contends that the trial court erred in not suppressing the incriminating statements made to his fellow inmates because their admission violated his sixth amendment right to counsel. In United States v. Henry, 447 U.S. 264 (1980), the United States Supreme Court held that statements made to a fellow inmate acting as a paid government informant are inadmissible because they violate an accused's right to counsel. This Court applied Henry in Malone v. State, 390 So.2d 338 (Fla. 1980), cert. denied, 450 U.S. 1034 (1981), and granted a new trial because the state had asked Malone's cellmate to obtain the incriminating statements that were used at trial.

Not all incriminating statements made to cellmates while in custody, however, are inadmissible. In Barfield v. State, 402 So.2d 377 (Fla. 1981), an inmate's testimony concerning incriminating statements was admitted after a finding that the inmate had not acted pursuant to government instruction. In Barfield the inmate approached the authorities on his own initiative after hearing the incriminating statements. See Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied, 456 U.S. 984 (1982).

The facts in the instant case are similar to Barfield. Michael was in custody when indicted on September 4, 1980. He

A3

confessed to Allen on September 3, and on September 10 Allen volunteered the statements to Detective Bolle. That was the first time any law enforcement agent had talked with Allen about the Michael investigation. A similar sequence of events occurred with the confession to Carmichael.

Michael contends that, because Allen and Carmichael had been used as informants during prior prison riots, they continued to be agents of Detective Bolle. Detective Bolle, however, had been assigned to the Pinellas County jail exclusively to investigate crimes occurring wholly within the jail and to obtain intelligence on any possible riots or disturbances that might happen in the jail. Pursuant to his job of uncovering possible riot or disturbance conditions it was necessary to call upon prisoner witnesses to give testimony. He used Allen and Carmichael as informants in those cases, but had not requested them to supply information about the instant case. We do not agree with Michael's contention that once an inmate is used as an informant, he becomes an agent for the state in all subsequent situations where he is an informant.

Michael also contends that the evidence presented by the state was not sufficient to prove him guilty beyond a reasonable doubt and that the evidence does not exclude a reasonable hypothesis of innocence. We disagree and hold that there is substantial, competent evidence in the record to sustain Michael's conviction. We recognize that, when the only proof of guilt is circumstantial, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence. Thomas v. State, 374 So.2d 508 (Fla. 1979), cert. denied, 445 U.S. 972 (1980). But here, in addition to the circumstantial evidence, we have Michael's confessions to inmates Allen and Carmichael. This constitutes direct evidence of the crime making the circumstantial evidence rule inapplicable.

Michael urges that the warrant obtained to search the house trailer was invalid because the supporting affidavit lacked probable cause. After review of the affidavit filed by the

A4

detective in charge of the investigation, we find that there was sufficient probable cause for the warrant to be issued.

Michael also argues that the police exceeded the authority of the warrant when they seized a small gray box that contained personal papers and Miss Dible's will. The police had the authority to search the contents of the box for possible evidence of the crime, and the discovery and use of the will was proper. Alford v. State, 307 So.2d 433 (Fla. 1975), cert. denied, 428 U.S. 912 (1976).

Michael further contends that the trial court erred in admitting a letter that he wrote to fellow inmate Jeffery Allen concerning his love and homosexual desires for Allen. After reviewing the record, we find no error in admitting the letter. Michael's homosexual preferances were already before the jury, and the trial court found the letter relevant in determining the voluntariness of Michael's confession to Allen.

Michael also challenges his sentance of death which the court imposed after the jury had recommended the death penalty. The trial court found as three aggravating circumstances that the murder was: (1) committed for pecuniary gain; (2) exceptional, heinous, atrocious, or cruel; and (3) committed in a cold, calculated and premeditated manner. The only mitigating circumstance found by the trial court was Michael's lack of a significant history of prior criminal activity.

Michael contends that the trial court failed to consider his mental and emotional disturbances in mitigation. In support of this contention, Michael introduced the report of one psychiatrist which expressed the possibility that he might not have been competent to stand trial. Evidence of incompetency to stand trial is not evidence of a defective mental condition at the time of commission of the offense. The psychiatrist who questioned his competency to stand trial could not form an opinion as to his competency at the time of the murder, nor did he express an opinion on any statutory mental mitigating circumstance. Further, Michael's mother testified that she had no knowledge of any

A5

significant psychological problems over the last fifteen years. Therefore, we find no error in the trial court's finding that the mental mitigating factors[2] did not apply. Smith v. State, 407 So.2d 894 (Fla. 1981), cert. denied, 456 U.S. 984 (1982).

Michael further contends that the aggravating factors of heinous, atrocious, and cruel and cold, calculated, and premeditated should not apply because his mental and emotional problems caused the murder. He cites two cases,[3] reasoning that in both the death sentences were reduced to life imprisonment because the mental and emotional disturbances of the defendants directly caused the murders and rendered these aggravating factors inapplicable. In both cases, however, the aggravating factors were found to apply but were outweighed by the mitigating factors. A defendant's emotional and mental problems do not affect the application of these two aggravating factors, but, rather, affect the weight given the mitigating factors. There was sufficient evidence for the trial court to find that the aggravating factor of committed in a cold, calculated, and premeditated manner was proven beyond a reasonable doubt.

Finally, we find no merit in Michael's contention that the aggravating factor that the murder was committed for pecuniary gain was not proven beyond a reasonable doubt. There is sufficient evidence in the record for the jury and the trial court to apply this aggravating factor. In the findings in support of the sentence of death the trial court stated:

> a. The capital felony was committed for pecuniary gain. Defendant, Michael, in the early part of 1980 was present when the victim, Fern Umble, revoked her will leaving her estate to various evangelistic entities and her brother and executed a new will bequeathing her entire estate to defendant, Michael. The defendant after murdering Miss Umble assumed possession of the small strong box in which the will had been placed for security.

---

[2] § 921.141(6)(b), (f), Fla. Stat. (1979).

[3] Buckaby v. State, 343 So.2d 29 (Fla.), cert. denied, 434 U.S. 920 (1977); Jones v. State, 332 So.2d 615 (Fla. 1976).

To insure that there would be no question that the victim, Umble, was dead and her estate subject to probation defendant, Michael, deposited the body in a place where it would be expected to be found within a reasonable time and wrapped it in a blanket or comforter which could indisputably be identified as belonging to the victim, Umble; this blanket or comforter had written on it the name of Miss Umble's sister, Myrtle, and the year 1961.

Circumstances indicate that at least one of the motives for the death of Miss Umble was pecuniary gain which the defendant hoped to obtain as the sole beneficiary of her estate.

Finding no error, we affirm both the conviction and sentence.

It is so ordered.

ALDERMAN, C.J., ADKINS, BOYD, OVERTON, McDONALD and ENGLISH, JJ., Concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

A7

An Appeal from the Circuit Court in and for Pinellas County.

B. J. Driver, Judge - Case No. CRC 80-5521 CFANO

Jerry Hill, Public Defender and David A. Davis, Assistant Public Defender, Tenth Judicial Circuit, Bartow, Florida,

for Appellant

Jim Smith, Attorney General and Frank Lester Adams, III, Assistant Attorney General, Tampa, Florida,

for Appellee

Supreme Court of Florida

THURSDAY, SEPTEMBER 29, 1983

JOHN MICHAEL,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 60,712

Circuit Court No. CRC80-5523 CFANO
(Pinellas)

Received By
OCT 04 1983
Appellate Division
Public Defenders Office

Upon consideration of the Motion for Rehearing filed in the above cause by attorney for appellant,

IT IS ORDERED that said Motion be and the same is hereby denied.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Sonya Carell
Deputy Clerk

TC
cc: Hon. Karleen F. DeBlaker, Clerk
Hon. B. J. Driver, Judge

David A. Davis, Esquire
Karla J. Staker, Esquire
Frank Lester Adams, III, Esquire

A9

INDICTMENT

In the Circuit Court for the Sixth Judicial Circuit of Florida,
in and for Pinellas County

SPRING TERM, in the year of our Lord one thousand nine hundred eighty

CRC 80-5523 CFANO
THE STATE OF FLORIDA

vs.

JOHN MICHAEL
SPN #104434

INDICTMENT FOR

MURDER IN THE FIRST DEGREE

IN THE NAME AND BY THE AUTHORITY OF THE STATE OF FLORIDA:

The Grand Jurors of the State of Florida, impaneled and sworn to inquire and true charge make in and for the body of the County of Pinellas, upon their oath do charge that

JOHN MICHAEL

of the County of Pinellas and State of Florida, on or between the 1st day of July, 1980, and the 3rd day of July in the year of our Lord, one thousand nine hundred eighty in the County and State aforesaid

did unlawfully and from a premeditated design to effect the death of FERN UMBLE, a human being, did stab the said FERN UMBLE with a knife or other object, a further description of which is unknown, thereby inflicting upon the said FERN UMBLE mortal wounds, of which said mortal wounds, and by the means aforesaid and as a direct result thereof, the said FERN UMBLE died;

FILED
SEP 4 1980
HAROLD MULLENDORE
CLERK CIRCUIT COURT
Deputy Clerk

ARRAIGNED
Written
SEP 25 1980
PLEA not guilty
CASE SET 11/4/80A
1/27/81B

4/29/81 - Jury trial - Guilty as charged

A10

contrary to Chapter ....782.04(1)(a)....., Florida Statutes, and against the peace and dignity of the State of Florida.

I, JAMES T. RUSSELL, State Attorney for the Sixth Judicial Circuit of Florida, have advised the Grand Jury returning the above Indictment, as authorized and required by law.

Ass't. .....
State Attorney for the Sixth Judicial Circuit of the State of Florida, prosecuting for said State.

Presented in open Court by the Grand Jury and filed this 4th day of September

A.D. 19 80.

.....
Clerk of the Circuit Court

By .....
Deputy Clerk

In Circuit Court
Sixth Judicial Circuit
Pinellas County, Florida

The State of Florida

vs.

JOHN MICHAEL

Indictment for

MURDER IN THE FIRST DEGREE

A TRUE BILL. FOUND SPRING TERM A.D. 1980

.....
Foreman of the Grand Jury

24

All .....
Ass't State Attorney

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA

CRC 80-5523 CFANO

STATE OF FLORIDA :
:
v. :
:
JOHN MICHAEL :

FILED IN THE COURT
23 April 1981
4:30 P.M.
B. J. [illegible], Circuit Judge

MOTION TO SUPPRESS

COMES NOW, the Defendant, JOHN MICHAEL, by and through his undersigned attorney, pursuant to Rule of Criminal Procedure 3.190(i) and moves this Honorable Court for an order suppressing all statements or admissions obtained illegally from him, and as grounds therefor states as follows:

1. That the Defendant is charged by indictment with the offense of Murder in the First Degree, said indictment being filed with the Clerk of the Circuit Court on September 4, 1980.

2. That the Defendant was arrested for the instant offense on August 2, 1980 in the State of Arizona and was subsequently transported to Clearwater, Florida and incarcerated in the Pinellas County Jail.

3. That at all pertinent times herein, the Defendant was incarcerated in the Pinellas County Jail.

4. That on various dates subsequent to the indictment being filed, two informants, Jeffrey Wayne Allen and Thomas Carmichael, both inmates confined to the same floor as Defendant obtained incriminating statements from Defendant and reported same to Deputy John Bolle of the Pinellas County Sheriff's Office.

5. That both informants had furnished information to Deputy Bolle of the Pinellas County Sheriff's Office in the past regarding actions of fellow inmates in the Pinellas County Jail.

FILED
APR 27 1981
[illegible]
CLERK CIRCUIT COURT
[illegible] Deputy Clerk

6. That Deputy John Bolle instructed both informants that although they should not question the Defendant about his case, they should continue to listen and report back what they hear to law enforcement.

7. That Deputy John Bolle advised each informant that although he could make no promises, he would make known their cooperation to anyone they so chose, the indication being to the Court that imposed sentence in their respective cases.

8. That at no time pertinent herein was the Defendant aware of the informant status of Jeffrey Wayne Allen and Thomas Carmichael.

9. That at all pertinent times herein the informants were housed in cells in close proximity to that of John Michael and/or were trustees on the same floor in which John Michael was incarcerated.

10. That at all pertinent times herein the Defendant was incarcerated in a single man cell on the fifth floor of Pinellas County Jail.

11. That in accordance with the holding of U.S. v. Henry, 48 USLW 4703 (June 16, 1980), law enforcement created a situation likely to induce the Defendant to make incriminating statements without the assistance of counsel and thereby violated the Defendant's Sixth Amendment right to counsel.

I HEREBY CERTIFY that a copy of the foregoing Motion to Suppress has been furnished by personal service to the Office of the State Attorney, Pinellas County Courthouse, Clearwater, Florida this 23 day of April, 1981.

GARY A. HEWETSON, P.A.

Gary A. Hewetson

Gary A. Hewetson
711-B Grand Central Street
Clearwater, Florida 33516
(813) 443-1611

for this Defendant to kill this woman is the fact that she had disapproved of him being in the house with young, various young men including the night before her death, sleeping with a 17-year-old male. The 17-year-old male is here. He's going to testify as to the sexual relationships with the Defendant. The Defendant also made admissions to a person in the jail to the effect that that was the reason she was upset is that he loved Mike Moren (phonetic), a male individual with whom he was sleeping up to the night, the day she was last seen alive, and for several days thereafter, and it seems to me it's highly relevant. It goes directly to his motive, his own admission that his, her disapproval of that relationship was one of the motivating forces. I don't think the State case could be tried without bringing that to the jury.

THE COURT: Motion denied, Mr. Hewetson, with the understanding that it will be essential in order to have it admitted. That is that it be shown to have some relevancy on the purpose of motive.

MR. HEWETSON: Very well, Your Honor. The next motion would be the Motion to Suppress, this being with regard to the statements made by Geoffory Wayne Allen and a Thomas Carmichael, both inmates of the Pinellas County Jail pertaining to the Defendant's alleged

admissions to them of his participation in this murder. Again, it would necessitate the taking of testimony from at least one witness, perhaps we can stipulate as to the testimony of the other two. Deputy Bolle (phonetic) would be the first one.

THE COURT: Let's get on with it.

THE BAILIFF: Face the Clerk, raise your right hand and be sworn.

WHEREUPON,

JOHN DAVID BOLLE

was called as a witness, and after being first duly sworn on oath, was examined and testified as follows:

THE BAILIFF: Have a seat in the witness stand, Detective. Please speak in a loud clear voice.

DIRECT EXAMINATION

BY MR. HEWETSON:

Q Please state your name.

A John David Bolle.

Q How are you employed?

A Sergeant, Pinellas County Sheriff's Office.

Q And how long have you been with the Sheriff's office now?

A A little over eight years.

Q Did you have occasion during those eight years to do work in the Pinellas County Jail here in Clearwater,

Florida?

A Yes, I did.

Q During what period of time?

A From May of 1980 to January of 1981.

Q Okay. 1981?

A Yeah, right.

Q Now, while you were working in the Pinellas County Jail, did you have occasion to come in contact with a Geoffory Wayne Allen and a Thomas Carmichael, both inmates?

A Yes, I did.

Q Okay. And did you have occasion to come into contact with both of these gentlemen in reference to a case involving State vs. John Michael?

A Yes, sir.

Q Now, when did you initially come into contact with Geoffory Wayne Allen concerning the State vs. John Michael case?

A I believe it was the 10th of September, 1980.

Q Where did you come into contact with him?

A He was in the County Jail.

Q Was anyone else present?

A I believe it was just myself and Geoffory Allen and Officer Haines might have been present, but I'm not sure.

Q Okay. This meeting took place exactly where in

A16

the Pinellas County Jail?

A In the Sergeant's Office, which is located on the first floor of the County Jail.

Q Okay. And this meeting was initiated by yourself or Geoffory Wayne Allen?

A Geoffory Allen.

Q Briefly, what discussion did you have with Geoffory Wayne Allen on that occasion reference the case State vs. John Michael?

A Geoffory Allen advised me of the fact that he had learned some information from John Michael that Mr. Michael had committed a homicide, was guilty apparently of the homicide for which he had been charged.

Q Okay. And did he go into detail?

A Yes, he did.

Q And did he explain to you on that occasion what John Michael allegedly told him?

A Yes, he did.

Q What did you tell Geoffory Wayne Allen, if anything, about how this could possibly help him or what you could do for him?

A Well, I advised Mr. Allen that I could make no promises whatsoever and neither could the State Attorney make any promises, but I assured him that when this case was all over I would be happy to tell his attorney or whomever

he wished of the fact that he had voluntarily come forth and given this information.

Q Okay. And by whomever he wished that would be, no doubt, the sentencing judge in his particular case, is that correct?

A Yes, sir.

Q Okay. Did you instruct or tell Geoffory Wayne Allen anything else?

A Yes, I instructed him that in the future that he was to ask no question of Mr. Michael whatsoever, that he was free to listen to whatever Mr. Michael wished to tell him and advise me of that.

Q Okay. So, basically your instructions were he could listen and he could report back to you if he heard anything of importance from John Michael, isn't that correct?

A That's correct.

Q Now, after receiving these instructions from you on the 10th of September, did Geoffory Wayne Allen ever return and give you more information about this particular case?

A Yes, he did.

Q Okay. When was the next time?

A I'm not really sure of the date. I think the 11th and 12th of September were the other two occasions.

Q Okay.

A But there were several occasions.

Q Several occasions?

A Yes.

Q Do you have any idea approximately how many?

A Two, but I'm just not sure of the dates.

Q There were two times, then, that he returned?

A Yes.

Q Basically, what did he tell you when he returned the second time?

A I believe he gave me some more information, more details about, about the murder, what Michael had told him.

Q This is very important. Try to recall what he said the second time.

A I really don't recall. I believe they were taped and that's, I believe, on the tapes.

Q We only had two tapes?

A I believe so, yes.

Q The tape of the 10th and then the tape of either the 11th or 12th, is that right?

A Correct.

Q Now, was there a tape in which Geoffory Wayne Allen told you of some type request on behalf of John Michael to have Mike Morin (phonetic) done away with? Do you recall that conversation?

A Yes.

Q And do you recall also on that particular date when the conversation pertaining to that matter was related to you that certain diagrams or maps or what have you or letters were also given to you by Geoffory Wayne Allen?

A That's correct.

Q This would have been on a date subsequent to the 10th of September, would it not?

A Correct.

Q Now, with regard to Thomas Carmichael, when did you first come into contact with Thomas Carmichael in reference to the case of State vs. John Michael?

A I don't recall the exact date, but it was after my contact with Geoffory Wayne Allen.

Q So, it would have been subsequent to September 10th anyway?

A Correct.

Q And how many times did you come in contact with Thomas Carmichael and have conversation with Thomas Carmichael in reference to John Michael?

A I don't believe it was more than several times. I really don't recall.

Q Well, two or three?

A Approximately.

Q Okay. Now, on the very first occasion, would it have been in the month of September?

A I'm really not sure.

Q Could it have been in August?

A No, definitely wouldn't have been in August.

Q How about October?

A Could have been.

Q So, September or October?

A Right.

Q Now, on the very first occasion that you spoke to Thomas Carmichael, was that conversation initiated by yourself or Thomas Carmichael?

A Thomas Carrichael.

Q And this took place over in the Pinellas County Jail?

A Correct.

Q In the same office?

A Correct.

Q Was anyone else present?

A I believe it was myself and, again, Jailer Haines may or may not have been there. I'm not sure.

Q On this first occasion, Thomas Carmichael related certain conversations of an incriminating nature that he and John Michael had had?

A Yes.

Q Now, on the next occasion you met with Thomas Carmichael, what was discussed?

A I really don't recall.

Q You can't recall?

A No.

Q How about the conversation after that, can you recall any conversations that you had with Thomas Carmichael after that first meeting?

A No.

Q Let me ask you this. During the course of that first meeting, did you likewise instruct Thomas Carmichael that, first of all, you would be more than happy to tell anyone of his choosing of his cooperation, the sentencing judge and, too, that he also should not really actively engage John Michael in conversation but should keep an ear open and report back to you if he heard anything?

A That's correct.

Q And he did, in fact, report back to you? You simply can't recall what he said?

A I believe so, yes.

MR. REWETSON: I have nothing further of this witness.

THE COURT: All right.

CROSS EXAMINATION

BY MR. HART:

Q Detective Bolle, prior to September 10th when you spoke with Geoffory Allen, he was not working as an informer

in the jail, was he?

A No.

Q You did not have any pre-arranged plan with him whereby he would obtain information or relay it to you from any prisoner?

A Well, let me change that. I would have to say, yes, he was.

Q What do you mean?

A Well, he had assisted me on a prior case, Geoffory Allen.

Q He came to you on a prior case?

A That's correct.

Q And he was a complainant in that case?

A Yes.

Q But you didn't seek him out in that case, did you?

A No.

Q He was complaining about something that happened to him in that particular case?

A Correct.

Q So, he was not an informant in that case, in the sense that he was working for the government or working for you?

A No, he was not.

Q Did he ever work for you? Did you ever pay him to obtain information?

A No.

Q Did you ever conjure up a plan or enter into any plan whereby he would question John Michael about his case?

A No, sir.

Q Did you ever have any pre-arranged plan whereby he would attempt to elicit information from John Michael?

A No, sir.

Q In fact, prior to September 10th of last year you never even heard of John Michael, is that correct?

A That's correct.

Q Geoffory Allen came to you unsolicited --

A That's correct.

Q -- with this information?

A That's correct.

Q And thereafter the extent to which you offered him any promise was to tell him that you would tell of the co-operation he had given you by coming forward to anybody he wanted you to tell it to?

A That's correct.

Q And you told him not to ask any questions?

A Yes, sir.

THE COURT: I heard the testimony. I don't think we need to go over that again.

Q (By Mr. Hart) Did you ever move Geoffory Allen's cell or arrange circumstances where he would be close to

A No.

Q Did you know anything about John Michael's case?

A No, sir.

Q Did you relate anything about John Michael's case to Jeff Allen?

A No.

Q With regard to Thomas Carmichael, did you single out or in any way point out John Michael as a person you were interested in?

A No, sir.

Q Did you ever move John Michael close to Thomas Carmichael or vice versa so that they might be in circumstances where they would converse?

A No, sir.

Q Did you ever enter into any plan or arrangement with Thomas Carmichael where he would relate information he had gathered from John Michael to you?

A No, sir.

Q Did you ever give, other than the instructions you have told us about, keep your ears open and don't ask any questions, did you ever instruct either Carmichael or Allen with regard to what the nature of their relationsh should be with John Michael?

A No, sir.

Q Did you ever move John Michael into any circum-

stances or change his cell at all?

A No, sir.

Q Did you ever talk to John Michael?

A No, sir.

Q And what is the, and isn't it a fact that the only thing you know about this John Michael case is what Allen and Carmichael have told you?

A That's correct.

MR. HART: I have nothing else.

THE COURT: Any re-direct?

MR. HEWETSON: Briefly.

RE-DIRECT EXAMINATION

BY MR. HEWETSON:

Q Both Jeff Allen and Thomas Carmichael, in fact, worked for you as informants in the jail, did they not?

A Yes, sir.

Q When did this commence? When did they begin to work for you?

A Thomas Carmichael has worked for me for sometime prior to this occasion.

Q Okay.

A And Geoffory Allen informed me on other cases, an escape case. That's the extent of Geoffory Allen's involvement.

Q Okay. And with regard to where it was those two

individuals were confined, that being Allen and Carmichael, they were both on the fifth floor, is that correct?

A That's correct.

Q They were both trusties on the fifth floor, so, they had access to move around and talk to one another, is that correct?

A That's correct.

Q Their cells remain very near, next to or across from John Michael's?

A I believe so.

Q You made no effort to split them up and move them anywhere after they talked to you?

A No, sir.

Q And finally, with respect to, well, both individuals, you, in fact, did make your comments known to either the judge or the State Attorney's office in regards to both of their sentences, did you not?

A Correct.

Q And you are aware both received probation on their respective charges, are you not?

A I don't believe --

MR. HEWETSON: I can assure you they did.

MR. HART: Mr. Carmichael is now serving five years in State Prison, and Mr. Allen is still in jail to this date as a condition, I think, of some probation, but I

don't want the Court to be misled.

MR. HEWETSON: Misled? I have the file and they both received probation on these charges, the violation of probation I'm talking about, the charges he was in jail on, the burglary charge, the three-count information.

MR. HART: Judge, that was the basis --

THE COURT: Just a minute, gentlemen. If the ness knows what happened to them, fine.

MR. HEWETSON: Do you know?

THE WITNESS: No.

MR. HEWETSON: I have nothing further.

MR. HART: Did you make any of those promises to m before or after they gave you the information about Michael?

THE WITNESS: After.

MR. HART: Thank you.

THE COURT: You may step down.

MR. HEWETSON: Judge, if I might have just a moment. Mr. Hart, perhaps we can save a little time.

MR. HART: Judge, the problem is that there were several conversations. If the Court is going to deny the motion in its entirety, it will be no problem. We dont' need to go any further. If the Court is of the mind to grant part of the motion and deny it in part,

then, we are going to need to filter out that which would be omitted from that which would not be admitted.

MR. HEWETSON: Judge, again, in an effort to save time why don't we do this. At this time I would like to argue one U.S. Supreme Court case which I think is governing.

THE COURT: Let's hear it.

MR. HEWETSON: Thank you. Judge, the case that I'm relying on here is the United States v. Henry found in United States Law Week dated June 17, 1980, page 4703, volume 48. Briefly, Your Honor, in that particular case they had informed, an informant in the jail which eventually testified against the Defendant, testimony concerning certain conversations the two of them had while incarcerated. The United States Supreme Court reversed the convictions based upon a denial of the Defendant's Sixth Amendment, his right to assistance of counsel. Now, there are certain factors which are very important, and I think also my analogy fits here. One of the criteria that is necessary to invoke the Sixth Amendment is post-indictment statements after the indictment was filed. If statements are made the Sixth Amendment may come into effect. Here the indictment was filed on September 4th, I believe --

MR. HART: 5th.

MR. HEWETSON: The mark on the Court file, I think, reflects the 4th, but whatever. It was just subsequent to any conversations that we are talking about here today or it was before any conversations. Now, in this particular case, an FBI agent instructed the informant, and I will read his affidavit which the Court put in the opinion as follows: I recall telling Nichols, Nichols being the informant at this time, to be alert to any statements made by these individuals, the federal prisoners, regarding the charges against them. I specifically recall telling Nichols that he was not to question Henry, that being the Defendant here, or these individuals about the charges against them. However, if they engage him in conversation or talked in front of him he was requested to pay attention to their statements. I recall telling Nichols not to initiate any conversations with Henry regarding the bank robbery charges against Henry, but that if Henry initiated the conversations with Nichols I requested Nichols to pay attention to the information furnished by Henry. The agent's affidavit also stated that he never requested anyone affiliated with the Norfolk City Jail to place Nichols in the same cell with Henry. The Court noted that Nichols had engaged in conversation with Henry and concluded that if by association, by general conver-

sation or both, Nichols had developed the relationship of trust and confidence with Henry such that Henry revealed incriminating information; this interfered with right of counsel and the Sixth Amendment. Now, there was really three factors which were brought up by the Court in arriving at this decision. First they say Nichols was acting under instructions as a paid informant for the government. Now, I'm going to distinguish that in one second. Number 2, Nichols was ostensibly no more than a fellow inmate with Henry, that applies with both of these inmates and John Michael, and 3, Henry was in custody and under indictment at the time he was engaging in conversation with Nichols, and that's true here. John Michael was indicted really on the 4th of September, and the conversations occurred from the 5th onward. Going back to Number 1, the only difference between that case and this case is that the informant there was a paid informant. Now, the instructions by the FBI agent and the instructions by Deputy Bolle is, you keep your ears open. You do not engage the man in active conversation. That didn't bother the Court. The problem here is that Deputy Bolle told each of these men, okay, in essence, I'm not going to give you any money but I'm going to make it known to anyone you want of your cooperation in this matter and that

would include the sentencing judge, and that's better than money. That is a type of reward if they can continue to give him information. It's the equivalent, if you will, of money. It's a benefit to them. I would submit that we meet the three factors test here. Both of these informants were going to gain something. They were going to benefit somehow through their cooperation. The Court went on, Your Honor, and distinguished the difference between the Fourth, Fifth and Sixth Amendments. They are saying we are not really concerned with Fourth and Fifth Amendment violations here, but we are definitely concerned with Sixth Amendment right of counsel after indictment, and it did not really matter that the FBI agent in this particular case cautioned them not to actively engage anyone in conversation. That was not the crux of it. The fact was that these agents or this agent did, in fact, tender something of benefit to this informant and the informant in exchange gave him information. I would submit, Your Honor, that in this particular case we are concerned with suppressing all statements that were made after the initial conversation that Allen had with Bolle and Carmichael had with Bolle. The first conversation, there is not too much I can do about that. There was no promise made at that time. That statement would

under this particular case but every other statement that was relayed by Carmichael or Allen to Detective Bolle after Bolle told them I will speak on your behalf, that should be excluded under this particular case. If the Court would desire a copy of the opinion I can give the Court a copy.

THE COURT: You have presented it very well. The Court finds the statements complained of made by the, presumably the witnesses, Carmichael and Allen, were not solicited by the State or the Sheriff, that the situation which they were made in is not one which is purposely or intentionally created, that at the time these statements were made the witnesses Allen and Carmichael were bona fide co-prisoners of the Defendant. They were not planned. They were not hired nor paid nor instructed to elicit information, that the information was not obtained through the connivence of the State. The Court does not perceive that the conduct of Mr. Bolle, after he advised these people, that evidence of such as to make the witnesses Allen and Carmichael agents or paid informants. The Court therefore finds any statements made to the witnesses Carmichael and Allen were made freely and voluntarily, were not induced or solicited. The Motion to Suppress is denied.

IN THE CIRCUIT COURT

FOR PINELLAS COUNTY, FLORIDA

CASE NO CRC8005523CFANO
SPN: 104434

STATE OF FLORIDA

vs

JOHN MICHAEL

MURDER IN THE FIRST DEGREE

FILED
APR 29 1981
KARLEEN F. DeBLAKER
CLERK CIRCUIT COURT
... Deputy Clerk

ORDER

The foregoing cause coming on this day to be heard upon Defendant's Motion to Suppress

and the same having been argued by counsel for the respective parties and duly considered by the Court; thereupon

IT IS CONSIDERED AND ORDERED that said motion be and the same is hereby denied

Dated this 27th day of April, 1981, in Clearwater, Florida.

CIRCUIT JUDGE

A34

CT CR 31

CIRCUIT COURT, PINELLAS COUNTY, FLORIDA

CASE NO. CRC80-05523CFANO CT. CR.

FILED

APR 29 [illegible]

[illegible] CLERK CIRCUIT COURT

[illegible] Deputy Clerk

STATE OF FLORIDA

vs.

John Michael

#104434

JUDGMENT AND SENTENCE - CAPITAL CASE - DEATH PENALTY

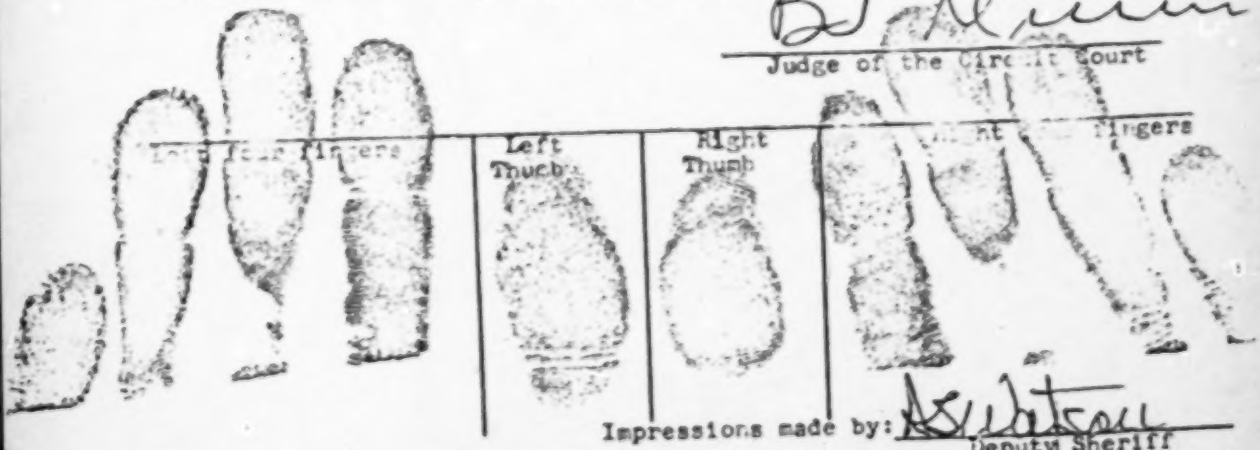
You, the defendant herein, being present in person and with counsel, Gary Hewetson, having been duly and regularly tried by a petit jury of twelve people for the crime of Murder in the First Degree as charged in the Indictment. And you being now attended by your counsel in open court, and having been called upon to say why sentence should not be pronounced upon you, and you having said nothing which would bar or preclude such sentence, it is, therefore,

THE SENTENCE OF THE LAW AND THE JUDGMENT AND ORDER OF THIS COURT, that you, for the crime of Murder in the First Degree, for which you now stand convicted, shall be taken by the Sheriff of the County of Pinellas to the common jail of said County or the State Prison in the State of Florida and there securely kept until such time as the Governor of the State of Florida shall in and by his Warrant fix and appoint, at which time you shall be delivered by the Sheriff of said County to the Superintendent of the State Prison of the State of Florida, at the place of execution named in the Governor's Warrant as soon as may be after receipt by the Sheriff of the said County of the Death Warrant for you from the Governor of said State, at which time and place in said Warrant fixed and named, and within the walls of the permanent death chamber provided by law, you shall be, by the proper execution officer of the State Prison, electrocuted until you are dead. And may God have mercy on your soul.

Thereupon the defendant was remanded to the custody of the Sheriff.

BJ Alvarez

Judge of the Circuit Court



Impressions made by: A S Watson

Deputy Sheriff

I hereby certify that the above and foregoing fingerprints on this Judgment are the fingerprints of the defendant, John Michael, and that they were placed thereon by said defendant in my presence, in open court, this the 29 day of April, 19 81.

BJ Alvarez

Judge of the Circuit Court

CT-CR 13

A35

IN THE CIRCUIT COURT FOR PINELLAS COUNTY, FLORIDA

CRC 80-5523 CFANO

STATE OF FLORIDA)
)
-vs-)
)
JOHN MICHAEL)
)

104434

FILED
MAY 01 1981

FINDINGS IN SUPPORT OF SENTENCE OF DEATH

Pursuant to the provisions of Chapter 921.141(3) the Court makes the following findings of fact upon which the sentence of death in this case is based.

SUFFICIENCY OF AGGRAVATING CIRCUMSTANCES

a. The capital felony was committed for pecuniary gain. Defendant, Michaels, in the early part of 1980 was present when the victim, Fern Umble, revoked her will leaving her estate to various evangelistic entities and her brother and executed a new will bequeathing her entire estate to defendant, Michaels. The defendant after murdering Miss Umble assumed possession of the small strong box in which the will had been placed for security.

To insure that there would be no question that the victim, Umble, was dead and her estate subject to probation defendant, Michaels, deposited the body in a place where it would be expected to be found within a reasonable time and wrapped it in a blanket or comforter which could indisputably be identified as belonging to the victim, Umble; this blanket or comforter had written on it the name of Miss Umble's sister, Myrtle, and the year 1903.

Circumstances indicate that at least one of the motives for the death of Miss Umble was pecuniary gain which the defendant hoped to obtain as the sole beneficiary of her estate

A36

THE CAPITAL FELONY WAS EXCEPTIONALLY HEINOUS, ATROCIOUS, OR CRUEL

The victim, Fern Umble, was a petite little old lady of 83 years who had befriended the defendant, Michaels, and provided for him as if he had been a son. Defendant, Michaels, is a large man approximately six feet two inches tall and appears to weigh in excess of 200 pounds and in good physical shape.

The defendant in the course of murdering Miss Umble choked her to the extent that there were ruptured blood vessels around the hyoid bone as well as small blood vessels in her eyes. The defendant ferociously attacked Miss Umble, as demonstrated by the severity of the injuries inflicted upon her; in addition to the choking of Miss Umble she was beaten severely about the head and upper torso and her rib cage was broken on both sides.

The defendant after beating and choking Miss Umble into unconsciousness obtained a knife from the kitchen of the mobile home and stabbed her in the face to the extent that there was a wound completely through her upper lip, there was a stab wound into the throat which penetrated to the larynx, and finally the death wound which was inflicted in the abdomen, penetrating the liver, severing the aorta, and terminating with damage to the ribs.

THE CAPITAL FELONY WAS COMMITTED IN A COLD, CALCULATED AND PREMIDITATED MANNER.

The act of murder itself apparently was conducted in a state of frenzied ferocity. The decision to kill, however, was calculated and coolly arrived at.

The morning on which the murder was committed the defendant arranged to deliver the sixteen year old lad that he had been cultivating for homosexual purposes to the boy's brother, thereby

getting him out of the home when the killing took place. Upon delivering the boy to his brother's home Michaels instructed him that he would be back later that morning to pick him up. The defendant apparently immediately returned to the mobile home where the murder was committed.

There is not any pretense of moral or legal justification for the murder of Fern Umble.

INSUFFICIENCY OF MITIGATING CIRCUMSTANCES

The Court finds the following mitigating circumstances:

The defendant has no significant history of prior criminal activity. Apparently based upon the testimony of his mother the defendant was once arrested and committed for molesting two young boys in Ohio.

There are no other mitigating circumstances.

WHEREFORE, the Court after weighing the aggravating and mitigating circumstances finds that the aggravating circumstances overwhelmingly outweigh the mitigating circumstances.

B.J. DRIVER
Sentencing Judge

83-5945

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IN THE

SUPREME COURT OF THE UNITED STATES

No.

JOHN MICHAEL,

Petitioner,

v.

STATE OF FLORIDA,

Respondent.

ON PETITION FOR A WRIT OF
CERTIORARI TO THE
SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

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ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

RESPONDENT'S BRIEF IN OPPOSITION

The Respondent, the State of Florida, by and through the undersigned Assistant Attorney General, respectfully requests that this Court deny the petition for writ of certiorari.

OPINION BELOW

Petitioner seeks review of a decision of the Supreme Court of Florida imposing the death penalty. That opinion is reported at 437 So.2d 138 (Fla. 1983).

JURISDICTION

The jurisdiction of this Court is sought to be invoked by Petitioner under Section 1257(3), Title 28, United States Code. It is Respondent's position that the issues raised here are not such as should be reviewed by this Court. Review by writ of certiorari is a matter of sound judicial discretion, and

will be granted only where there are special and important reasons therefore. See Rule 19, Rules of the Supreme Court of the United States; Ross v. Moffitt, 417 U.S. 600, 94 S.Ct. 2437, 41 L.Ed. 2d 341 (1974).

QUESTIONS PRESENTED

Whether for purposes of the rule announced in Massiah v. United States a jail inmate who has previously acted as an informant for the State continues to be an agent of the State when he, on his own initiative but for the State's use, elicits incriminating information from another inmate housed near him who has been indicted for a capital offense?

REASON WHY THE WRIT SHOULD BE DENIED

I

This court's holdings in Massiah v. United States, 377 U.S. 201 (1964) and United States v. Henry, 447 U.S. 264 (1980) are quite clear as they relate to the term of the government agent's "agency". Those cases deal with the government's solicitation of an individual to gain the confidence of a criminal suspect against whom charges had been brought in order to induce the suspect to make post-indictment incriminating statements relating to those charges.

The basis of these two holdings is that such statements are inadmissible at trial as a result of having been obtained in violation of the Sixth Amendment right to counsel.

The scope of the agency in Massiah and Henry relates to that time period often indictment and begore trial. It relates to one

(or more) informants recruited by the government to seek information from one specified person about the crime for which he was indicted.

The Petitioner's argument that once an informer has informed once against one person, he is forever a government agent against all persons with whom he comes in contact has no basis in this court's holdings in Massiah and Henry.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished, by U.S. Mail to William C. McLain, Assistant Public Defender, Hall of Justice Building, 455 North Broadway Avenue, Bartow, Florida 33830-3798, on this 12th day of December, 1983.

Frank Lester Adams, III
OF COUNSEL FOR RESPONDENT